Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY,

Petitioner,

v.

THOMAS T. IRVIN, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Packers and Stockyards Act of the United States preempts Georgia's regulation of insurance and abrogates the common law with regard to the defenses of a compensated surety?

II. Whether an insurance company which is taxed and regulated by the Georgia Insurance Code and the Regulations of the Georgia Commissioner of Insurance is engaged in the business of insurance when it sells surety bonds.

III. Whether the Supreme Court must reconcile the Eleventh Circuit's departure from United States Supreme Court precedent, as well as precedent from the Seventh Circuit and the Eighth Circuit, which requires that a compensated surety be treated as an insurer?

INTERESTED PARTIES

The following persons and entities have or may have an interest in the outcome of this case:

American Manufacturers Mutual Insurance Company
Isaac Byrd
Callaway, Nevile & Brinson
William E. Callaway, Jr.
Coffee County Stockyard
The Honorable Emmett R. Cox
Scott C. Crowley
Laurie Webb Daniel
Dillard & Bower
Terry A. Dillard
Elliott & Blackburn
The Honorable Peter T. Fay
Gainesville Livestock Market, Inc.
Georgia Farm Bureau Marketing Association, Inc.
John E. Hennelly
Holland & Knight LLP
Hudson & Solomon
Thomas T. Irvin
Jeffrey Y. Lewis
Madison Hog Market, Inc.
James R. McCain, Jr.
Charles B. Merrill, Jr.
Merrill, Stone & Parks
The Honorable William T. Moore
The Honorable John F. Nangle
Betty G. Paulk
Jordan Ashley Paulk
Paulk Livestock and Transport, Inc.

INTERESTED PARTIES – Continued

Thurston D. Paulk, Jr. Heirs at Law
South Carolina Farm Bureau Marketing Association, Inc.
Cathy C. Taylor
Tison Hog Market

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that no parent or publicly held company owns 10% or more of the stock of American Manufacturers Mutual Insurance Company.

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OPINIONS BELOW

Petitioner seeks review of the opinion of the Eleventh Circuit Court of Appeals in this case reported as *American Manufacturing Mutual Insurance Company v. Tison Hog Market, Inc.*, 182 F.3d 1284 (11th Cir. 1999). That opinion appears in the Appendix to this petition at App. 1. The decision of the United States District Court for the Southern District of Georgia, vacated and remanded by the Eleventh Circuit, appears in the Appendix at App. 15.

JURISDICTIONAL GROUNDS

Pursuant to 28 U.S.C. § 1254(1), petitioner American Manufacturers Mutual Insurance Co. files this Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals seeking review of the court's August 3, 1999 decision vacating the district court's grant of summary judgment to the petitioner on its state law claims. The petitioner's timely petition for rehearing or for rehearing *en banc* was denied on February 2, 2000, and the Eleventh Circuit's mandate issued on March 1, 2000.

RELEVANT STATUTES

> No requirement of any State or territory of the United States, or any subdivision thereof, or the District of Columbia, with respect to the bonding of packers or prompt payment by packers for livestock purchases may be enforced upon

any packer operating in compliance with the bonding provisions under section 204 of this title respectively: Provided, That this section shall not preclude a State from enforcing a requirement, with respect to payment for livestock purchased by a packer at a stockyard subject to this chapter, which is not in conflict with this chapter or regulations thereunder: Provided further, That this section shall not preclude a State from enforcing State law or regulations with respect to any packer not subject to this chapter or section 204 of this title.

7 U.S.C. § 228c, Packers and Stockyards Act

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation by the several states.

Section 1 of the McCarran-Ferguson Act, 15 U.S.C. § 1011

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended,

known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Section 2 of the McCarran-Ferguson Act, 15 U.S.C. § 1012

(2) "Insurance" means a contract which is an integral part of a plan for distributing individual losses whereby one undertakes to indemnify another or to pay a specified amount of benefits upon determinable contingencies.

(4) "Insurer" means any person engaged as indemnitor, surety, or contractor who issues insurance, annuity or endowment contracts, subscriber certificates, or other contracts of insurance by whatever name called. Hospital service nonprofit corporations, nonprofit medical service corporations, burial associations, health care plans, and health maintenance organizations are insurers within the meaning of this title.

O.C.G.A. § 33-1-2 (2) and (4)

Surety insurance includes:

(1) Fidelity insurance, which is insurance guaranteeing the fidelity of persons holding positions of public or private trust;

(2) Insurance guaranteeing the performance of contracts other than insurance policies and guaranteeing and executing bonds, undertakings, and contracts of suretyship;

O.C.G.A. § 33-7-7 (1) and (2)

(a) All statements and descriptions in any application for an insurance policy or annuity

contract or in negotiations for such, by or on behalf of the insured or annuitant, shall be deemed to be representations and not warranties.

(c) Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:

(1) Fraudulent;

(2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or

(3) The insurer in good faith would either not have issued the policy or the contract or would not have issued a policy or contract in as large an amount or at the premium rate as applied for or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.

O.C.G.A. § 33-24-7

INTRODUCTION

This surety bond case presents important issues regarding the reach and application of the McCarran-Ferguson Act and whether a federal court may ignore

state insurance law by applying principles of uncompensated surety law rather than insurance law to an insurance company engaged in the business of issuing surety bonds for compensation.

The decision of the Eleventh Circuit is in conflict with both common law and the Georgia Insurance Code and should be reversed. It ignores the common law requirement that compensated sureties be treated as insurance companies, a requirement recognized by this Court and by the Seventh and Eighth Circuits. The decision refuses to apply Georgia insurance law to insurance companies that are currently regulated and taxed by the Georgia Insurance Code and the Regulations of the Insurance Commissioner of Georgia. Beyond that, by characterizing the transaction at issue as one of suretyship rather than the business of insurance, the Eleventh Circuit has ignored the dictates of the McCarran-Ferguson Act, which recognizes that the States, not the federal government, are the proper regulators of the business of insurance.

STATEMENT OF THE CASE AND FACTS

On August 30, 1995, Petitioner American Manufacturers Mutual Insurance Company ("American Manufacturers") filed a complaint pursuant to 28 U.S.C. § 2201 seeking inter alia a decree that two surety bonds which it had issued were void *ab initio* on the ground that the indemnity agreements done in conjunction with the bond applications contained falsified signatures. Respondents Gainesville Livestock Market, Inc., Madison Livestock

Market, Inc. d/b/a Townsend Livestock Market, and South Carolina Farm Bureau Marketing Association, Inc. (collectively the "Livestock Sellers") answered and counterclaimed for sums alleged to be due under the bonds. Respondent Tison Hog Market, Inc. ("Tison") also filed suit against American Manufacturers seeking payment for sums alleged due under the bonds. Respondent Thomas T. Irvin, Commissioner of Agriculture for the State of Georgia ("Commissioner Irvin") as trustee for the claimants under the bonds, filed an answer. The cases were consolidated and the Livestock Sellers, Tison and Commissioner Irvin all filed motions for summary judgment. American Manufacturers responded to the respective motions of the Respondents and filed its own cross-motion for summary judgment.

On April 9, 1997, the district court issued its Order granting American Manufacturers' motion for summary judgment, holding that the Packers and Stockyards Act does not preempt Georgia insurance and surety law, that American Manufacturers in issuing the surety bonds was involved in the business of insurance, and that the surety bonds issued by American Manufacturers were void under Georgia insurance law. The district court denied the respective motions for summary judgment filed by the Respondents. A final judgment was rendered April 2, 1998.

The Eleventh Circuit vacated the decision of the district court, holding that under common law, fraud is not a defense to a surety. The holding did not recognize any distinction between uncompensated sureties and compensated sureties (i.e., insurance companies). The Eleventh Circuit then held that under Georgia law the surety

bonds are not surety insurance, that American Manufacturers' liability is governed by surety law rather than insurance law, and that while under Georgia's insurance law the surety bonds would have been void *ab initio* because of fraud, under principles of surety law, American Manufacturers remained liable to Respondents in spite of the fraud of the principal.

Issuance of the Surety Bonds

On January 27, 1993, Thurston D. Paulk, Jr. d/b/a Paulk Livestock Company ("Paulk Livestock") applied to American Manufacturers for a surety bond as required by the Packers and Stockyards Act, 7 U.S.C. § 181 *et seq.* ("PSA"). The application contained an agreement to indemnify American Manufacturers for any losses which it might incur as a result of issuing the bond. Appearing in the indemnity agreement were two signatures, one signature apparently that of Thurston Paulk and the other signature apparently that of his wife, Betty Paulk. Ms. Glenda White, an employee of Thurston Paulk, signed the witness line next to each signature.

Based on the information and representations contained in the bond application, American Manufacturers issued Bond No. 3SE779133-00 (the "Paulk Bond") in the original principal amount of $80,000.00 on February 1, 1993. At the request of the United States Department of Agriculture ("U.S.D.A."), the amount of the Paulk Bond was increased to $85,000.00 on June 9, 1994, by means of a rider. The rider stated that the Paulk Bond was subject to all of its terms as modified by the rider, but the only change in the terms was the amount of the bond.

On March 5, 1993, Coffee County Stockyard applied to American Manufacturers for the surety bond required by the PSA. The application contained an agreement to indemnify American Manufacturers for any losses which it might incur as a result of issuing the bond. Appearing in the indemnity agreement of this application were three signatures: one apparently that of Thurston Paulk; one apparently that of Betty Paulk; and, one apparently that of Ashley Paulk. Again, Ms. Glenda White signed the witness line next to each of the three signatures.

On the basis of the information and representations contained in the bond application, American Manufacturers issued Bond No. 3SE779121-00 (the "Coffee County Bond") in the original principal amount of $75,000.00 on March 10, 1993. At the request of the U.S.D.A. the amount of the Coffee County Bond was increased to $80,000.00 on June 9, 1994, by means of a rider. The rider stated that the Coffee County Bond was subject to all of its terms as modified by the rider, but the only change in the terms was the amount of the bond.

On July 6, 1994, a General Agreement of Indemnity was executed which bore the purported signatures of Thurston Paulk and Betty Paulk. Again, the signatures were accompanied by the witness signature of Ms. White. By the terms of the General Agreement of Indemnity, the indemnitors agreed to indemnify and hold harmless American Manufacturers from all claims, liability and costs which American Manufacturers might pay or incur as a consequence of having executed the bonds.

U.S.D.A. Suspends Paulk Livestock Company and Coffee County Stockyard, Inc.

On December 5, 1994, after an investigation and administrative hearing, U.S.D.A. issued an Order suspending the registrations of Thurston Paulk d/b/a Paulk Livestock Company and Coffee County Stockyard, Inc. Each company was prohibited from engaging in the business of a dealer or a market agency until it could demonstrate that its assets exceeded its liabilities. In addition, the Order directed the companies to cease and desist from: engaging in business until solvent; issuing checks in payment for livestock without having sufficient funds to back them; failing to pay when due the full purchase price of livestock; depositing checks or drafts in bank accounts which are drawn on closed or non-existent accounts or engaging in other practices with the purpose of creating a false float or balance in its bank account; misrepresenting to purchasers of livestock the actual weight of the livestock; preparing and issuing in connection with the purchase or sale of livestock invoices, billings or other documents showing false, inaccurate or misleading weight entries for livestock; and, collecting payment from purchasers of livestock on the basis of false, inaccurate or misleading accounts, invoices or billings. For previous violations, U.S.D.A.'s Order also assessed a $50,000.00 civil penalty jointly and severally against Thurston Paulk and Coffee County Stockyard, and a separate $15,000.00 penalty against Thurston Paulk.

American Manufacturers was neither a party to nor timely notified of these proceedings. Further, it was never notified of the insolvency of either Paulk Livestock or Coffee County Stockyards.

Claims are made against the Bonds

Checks issued by Paulk Livestock and Coffee County Stockyard, Inc. in payment for hogs purchased were returned unpaid. Madison Livestock Market, Inc. made a claim against the Paulk Bond in the amount of $27,907.99 for hog sales which occurred on November 7 and 14, 1994. South Carolina Farm Bureau Marketing Association made a claim against the Paulk Bond in the amount of $62,352.27 for hog sales which occurred on October 18 and November 15 and 16, 1994. Gainesville Livestock Market, Inc. made a claim against the Coffee County Bond in the amount of $16,895.20 for hog sales taking place on January 20, 1995. Georgia Farm Bureau Marketing Association, Inc. made a claim in the amount of $11,345.96 against the Coffee County Bond for hog sales occurring on January 11, 1995. Tison made separate claims against both the Paulk Bond and the Coffee County Bond in the amount of $54,869.91 for hog sales on November 1, 3, 8 and 10, 1994. The combined claims under the two bonds totaled $173,371.33.

American Manufacturers' Investigation And Rescission of the Surety Bonds

American Manufacturers was notified of the various claims by Commissioner Irvin and, pursuant to this notification, began an investigation of the claims. This investigation revealed that there were grounds for questioning the validity of certain signatures on the bond applications and the General Indemnity Agreement.

On July 19, 1995, Ashley Paulk testified by affidavit that he did not sign, authorize, approve or ratify the

signing of his name to the application for the Coffee County Bond. On July 25, 1995, Glenda White Lang (formerly Glenda White) testified by affidavit that, although she had signed her name as a witness to the application for the Coffee County Bond, she did not see either Ashley Paulk or Betty Paulk sign either the application for the Paulk Bond or the General Indemnity Agreement. She testified that she had signed the witness lines on all three documents because her employer, Thurston Paulk, had told her to do so. On the basis of this testimony, American Manufacturers declared the Coffee County Bond rescinded and returned all premiums paid to Coffee County Stockyard.

On June 12, 1996, Betty Paulk testified by affidavit that she never signed, authorized, approved or ratified the signing of her name on the application for the Paulk Bond, the application for the Coffee County Bond, or the General Indemnity Agreement. On June 15, 1996, American Manufacturers declared the Paulk Bond rescinded and returned all premiums paid under the Bond to Paulk Livestock Company.

Basis for Jurisdiction Below

The district court had jurisdiction pursuant to 28 U.S.C. § 1332. The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

WHY THE WRIT SHOULD BE GRANTED

The Eleventh Circuit's opinion ignores provisions of the Georgia Insurance Code as well as established principles of common law, recognized by this Court and by the Seventh and Eighth Circuits, which require the application of insurance law, not surety law, to compensated sureties. The Eleventh Circuit gets to this result by finding that an insurance company selling surety bonds in Georgia is not engaged in the business of insurance and therefore is not entitled to the protections which the Georgia Code extends to insurance companies whose policies have been secured through fraud. In addition, by finding that the sale of surety bonds is not the business of insurance, the Eleventh Circuit is able to avoid application of the McCarran-Ferguson Act, which recognizes that the business of insurance is subject to the laws of the several States and that the Georgia Insurance Code is not preempted by the provisions of the Packers and Stockyards Act.

American Manufacturers Was Engaged In The Business of Insurance In Issuing The Surety Bonds

The district court held that because American Manufacturers "agreed to indemnify third parties in the event of certain contingencies, the Paulk and Coffee County Bonds qualify as insurance contracts and Plaintiff qualifies as an insurer within Title 33 of the Georgia Code." The district court's holding is borne out by specific and unambiguous provisions of the Georgia Insurance Code, which denominates surety as a class of insurance and subjects it to the provisions of the Insurance Code and to

regulation and taxation by the Commissioner of Insurance. *See, e.g.*, O.C.G.A. §§ 33-1-2(2), 33-1-2(4), 33-1-7, 33-5-22, 33-5-54, 33-6-5 33-7-7, 33-8-4, 33-10-6; Ga. Comp. R. & Regs. §§ 120-2-2-.19, 120-2-2-.22, 120-2-18-.12, Exhibit G.

Georgia case law also establishes that companies which provide surety insurance for compensation are in the insurance business. In *Houston General Insurance Co. v. Brock Construction Co., Inc.*, 241 Ga. 460, 246 S.E.2d 316 (1978), the Georgia Supreme Court distinguished between compensated and uncompensated sureties and held that Title 10 of the Georgia Code, Georgia's surety law, did not apply to compensated sureties. The court noted that compensated sureties are conducting business for profit; thus, they "are in the insurance business, and bonds such as the one in this case are a form of insurance contract." 241 Ga. At 462.

Courts in other jurisdictions are in harmony with the Georgia courts, concluding, on the basis of the nature of surety bonds, common law or state code provisions similar to those in the Georgia Code, that surety bonds are insurance policies or contracts subject to the principles of insurance law, not surety law. *See, e.g., Massachusetts Bonding & Ins. Co. v. Ray Dilschneider, Inc.*, 203 F.2d 556, 561 (8th Cir. 1953); *Loyal Order of Moose, Lodge 1392 v. International Fidelity Insurance Co.*, 797 P.2d 622, 628 (Alaska 1990); *Federal Surety Co. v. White*, 295 P. 281, 290 (Colo. 1931); *K-W Industries v. National Surety Corp.*, 754 P.2d 502 (Mont. 1988); *General Insurance Co. of America v. Mammoth Vista Owners Ass'n, Inc.*, 220 Cal. Rptr. 291, 298 (Cal. Ct. App. 1985); *United States v. Travelers Indemnity Co.*, 37 F.R.D. 322, 324 (D. Or. 1965); *Transamerica Premier*

Insurance Co. v. Brighton School District 27J, 940 P.2d 348, 352 (Colo. 1997); *Frontier Insurance Service, Inc. v. State*, 849 P.2d 328, 332 (Nev. 1993); *Threlkeld-Covington, Inc. v. Baker Drywall Co., Inc.*, 837 S.W.2d 840, 842 (Tex. Ct. App. 1992); *Szarkowski v. Reliance Insurance Co.*, 404 N.W.2d 502, 504 (N.D. 1987).

Scholarly treatises also teach that a compensated surety is engaged in the business of insurance. Indeed, 72 C.J.S. *Principal and Surety*, § 61 of which the Eleventh Circuit cites in its opinion, recognizes this rule. Section 292 of that same volume states that "[t]he business of corporations organized for the purpose of profit, in becoming the sureties for the performance of contracts of various kinds, is largely in the nature of insurance," and that such a compensated surety "is for all intents and purposes an insurance company."

In the face of this great weight of authority, the Eleventh Circuit nonetheless concluded that American Manufacturers was not doing the business of insurance when it issued the surety bonds. This erroneous conclusion stems from the fact that the Eleventh Circuit failed to recognize the distinction drawn in Georgia and other jurisdictions between compensated and uncompensated sureties.

As stated above, specific and unambiguous provisions of the Georgia Insurance Code make clear that the Georgia legislature intended that compensated suretyship be among the businesses subject to regulation and taxation under the Georgia Insurance Code. O.C.G.A. § 33-1-2(4) defines an "insurer" as "any person engaged

as . . . surety . . . who issues . . . contracts of insurance by whatever name called," and O.C.G.A. § 33-7-7, which specifically refers to surety agreements as "surety insurance," defines it as "[i]nsurance guaranteeing the performance of contracts other than insurance policies. . . . " The American Manufacturers bonds were "insurance guaranteeing the performance of contracts other than insurance policies" since they guaranteed the performance of the stockyards' contracts with their suppliers.

The Eleventh Circuit reads O.C.G.A. § 33-7-7 to mean that "**[a]mong other things**, surety insurance is insurance that a surety will perform its obligations under a surety contract. This definition, by its clear terms, indicates that surety insurance is distinct and separate from surety contracts like those at issue in this case." (emphasis added). The Eleventh Circuit's very words "among other things" betray the fallacy of its reasoning. Clearly, the fact that the surety bonds don't fit one definition of surety insurance does not mean that they do not fall within the other definitions, such as "[i]nsurance guaranteeing the performance of contracts other than insurance policies." Beyond that, the Eleventh Circuit fails to recognize that the term "contracts of suretyship" refers to contracts entered into by uncompensated sureties. This alternative definition applies to situations where an insurance company guarantees the performance of an uncompensated surety's obligation. That "contracts of suretyship" are surety agreements entered into by uncompensated sureties, not compensated sureties, is made clear in *Home*

Savings Bank of Columbus v. Massachusetts Bonding & Insurance Co., 19 Ga. App. 352, 362, 91 S.E. 494, 499 (1917), wherein the court stated:

> It is undoubtedly true that, while the [fidelity] bond in this case may resemble a contract of suretyship, it is in effect a contract of insurance, to which the rules of construction peculiar to contracts of suretyship proper would not apply, but to which the rules governing ordinary contracts of insurance are applicable.

The Eleventh Circuit finds support for its conclusion that these bonds must be enforced under Georgia surety law in *Broughton v. Joseph Lazarus Co.*, 13 Ga. App. 153, 78 S.E. 1024 (1913) and *W.T. Rawleigh Co. v. Oliver*, 67 Ga. App. 748, 21 S.E.2d 490 (1942). These cases, however, are completely inapposite because, *inter alia*, they involve **uncompensated sureties**. Again, the Eleventh Circuit fails to appreciate the difference between compensated and uncompensated sureties. In failing to recognize this distinction, the Eleventh Circuit incorrectly applies the law of suretyship, which does not allow voidance of the obligation for fraud of the principal against the surety where the creditor/beneficiary does not participate, rather than the Georgia Insurance Code, § 33-24-7, which requires voidance in that circumstance.

The Packers and Stockyards Act Does Not Conflict With Georgia Insurance Law

The district court concluded that the Packers and Stockyards Act (PSA) did not preempt Georgia law and did not, therefore, deprive American Manufacturers of defenses available to it under the Georgia Insurance

Code. The district court's conclusions were based on its construction of 7 U.S.C. § 228c, which provides:

> No requirement of any State or territory of the United States, or any subdivision thereof, or the District of Columbia, with respect to the bonding of packers or prompt payment by packers for livestock purchases may be enforced upon any packer operating in compliance with the bonding provisions under section 204 of this title respectively: Provided, That this section shall not preclude a State from enforcing a requirement, with respect to payment for livestock purchased by a packer at a stockyard subject to this chapter, which is not in conflict with this chapter or regulations thereunder: Provided further, That this section shall not preclude a State from enforcing State law or regulations with respect to any packer not subject to this chapter or section 204 of this title.

The district court held that no provision of the PSA expressly preempts state law, acknowledging that while the PSA disallows conflicting state bonding requirements, it does nothing to collateral issues of state contract law. The district court also found no field preemption, observing that none of the parties had argued that the PSA preempts the entire field of livestock trading, including state law governing contracts and insurance to the livestock industry. This conclusion that there is no field preemption is supported by case law. *See, e.g., DeVries v. Sig Ellison & Co.*, 100 F. Supp. 781, 786 (D. Minn. 1951); *Black Hills Packing Co. v. S.D. Stockgrowers Ass'n*, 397 F. Supp. 622, 630 (D. S.D. 1975). Finally, the district court concluded that there is no conflict between the PSA and state law that would warrant a finding of conflict preemption

since it is possible to comply with both the bonding requirements of the PSA and the law of Georgia governing the formation of insurance contracts.

The Eleventh Circuit essentially avoided a meaningful preemption analysis by misapplying the common law of uncompensated suretyship, under which fraud is no defense, to a compensated surety, American Manufacturers, which, as an insurer, is entitled to the fraud defense of the Georgia Insurance Code.

The McCarran-Ferguson Act Mandates Application of Georgia's Insurance Code

Even if the PSA and Georgia Insurance law did conflict, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, requires application of state insurance law rather than federal law. Congress passed the McCarran-Ferguson Act in response to the decision in *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 89 S. Ct. 564 (1969). The Act reaffirmed the principle that "the continued regulation and taxation by the several States of the business of insurance is in the public interest." 59 Stat. 33 (1945), 15 U.S.C. § 1011. Thus, Congress recognized the States' primary authority to regulate and tax the business of insurance. This authority under McCarran-Ferguson is not limited to traditional insurers but covers any entity engaged in the business of insurance since the focus of the Act is on the "challenged practice rather than the label placed on the defendant." *Gordon v. Ford Motor Credit Co.*, 868 F. Supp. 1191, 1194 (N.D. Cal. 1992).

The McCarran-Ferguson Act precludes the application of a federal statute such as the PSA against a party engaged in the insurance industry in deference to state law if: 1) the federal statute does not specifically relate to the business of insurance; 2) the complained of activities constitute the "business of insurance"; 3) the state has enacted laws for the purpose of regulating the complained of activity; and 4) the federal statute would invalidate, impair or supersede state law. *See, e.g., Everson v. Blue Cross and Blue Shield of Ohio*, 898 F. Supp. 532, 543 (N.D. Ohio).

As to the first prong, it is clear that the PSA does not "specifically relate to the business of insurance." The PSA regulates livestock commerce. The second prong is also satisfied. As set forth above, under the Georgia Insurance Code, an insurance company engaged in issuing surety bonds is carrying on the business of insurance; further, the premiums it receives are taxed under O.C.G.A. § 33-8-4. The third prong is satisfied if the state has enacted laws for the purpose of regulating the activity at issue. This requirement is met as long as the state regulatory scheme is not "mere pretense." *F.T.C. v. National Casualty Co.*, 357 U.S. 560, 564, 78 S. Ct. 1260, 1262 (1958). It is beyond dispute that Georgia regulates all aspects of the business of insurance in the state, including surety bonds, and that Georgia taxes premiums received by insurance companies on their policies, including premiums received on surety bonds.[1] The final question is

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[1] The Eleventh Circuit's opinion, however, casts significant doubt on whether Georgia's Insurance Code regulates and taxes insurance companies' sale of surety bonds. The Eleventh

whether application of the PSA would invalidate, impair or supersede the state law. Obviously, if the PSA would impose liability upon American Manufacturers when Georgia insurance law would excuse liability, the PSA invalidates, impairs or supersedes state law. Accordingly, the Georgia Insurance Code, not the PSA, would govern this case and American Manufacturers would not be liable on the bonds under the provisions of O.C.G.A. § 33-24-7, which voids insurance contracts obtained through fraud.

The 11th Circuit's Decision Ignores Precedent Of This Court And Creates A Conflict With Opinions Of The 7th Circuit and 8th Circuit Courts of Appeals

In *Chapman v. Hoage*, 296 U.S. 5, 26, 56 S. Ct., 333 (1936), the Supreme Court of the United States acknowledged the fact that the common law recognized the difference between compensated sureties and uncompensated sureties, treating the former as insurers, and the latter as sureties. As far as American Manufacturers has been able to find, this case is still good law. However, despite this Court's recognition of the distinction between compensated and uncompensated sureties, the Eleventh Circuit has found in this case that there is "no merit" to American Manufacturers' argument based on that distinction, refusing to even acknowledge the distinction. 182 F.3d at 1290, n. 8. Needless to say, only this Court, and not the

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Circuit's holding would justify these insurers' denial of such regulatory authority in the Georgia Insurance Commissioner and refusal to pay premium taxes.

Eleventh Circuit, may overrule one of this Court's precedents. *Jaffree v. Wallace*, 705 F.2d 1526, 1532 (11th Cir. 1983). An inferior federal court must act as required by a decision of the Supreme Court even if it concludes that the Supreme Court's decision was error. *Id. See also United States v. Gillespie*, 974 F.2d 796 (7th Cir. 1992) (holding that Article III courts have an obligation "to follow Supreme Court precedent, not contract or expand it. . . . ").

The Eleventh Circuit's decision also creates a conflict among the Circuits on the distinction between compensated and uncompensated sureties. In *American State Bank v. United States Fidelity & Guaranty Company*, 331 F.2d 479 (7th Cir. 1964), the Seventh Circuit held that surety contracts "entered into for a consideration" are insurance contracts as to "the interpretation and construction of such contracts under state substantive law." *Id.* at 482. Similarly, in *Jack v. Craighead Rice Milling Co.*, 167 F.2d 96 (8th Cir. 1948), the Eighth Circuit held that where the surety is a paid surety, "the contract of suretyship is to be construed in the same manner as a contract of insurance." *Id.* at 100.

The 11th Circuit's opinion in the case at bar contradicts this authority by treating American Manufacturers, a compensated surety, as an uncompensated surety, one to whom the defense of fraud set out in the Georgia Insurance Code is not available. The Eleventh Circuit's creation of a conflict between the Circuits on this issue provides a valid and proper basis to this Court to grant American Manufacturers' Petition for Writ of Certiorari. *Langenkamp v. Culp*, 498 U.S. 42, 45, 111 S. Ct. 330, 332 (1990) (granting petition for certiorari where decision of

court of appeals created a conflict among circuits on issue).

The opinions cited above, in addition to the authority cited earlier in this brief, make it clear that the common law recognizes a difference between compensated and uncompensated sureties, and treats compensated sureties as insurers. The Eleventh Circuit deviates from that rule, in violation of the principle that changes in or abrogation of the common law must be clearly and plainly expressed by the legislature. *United States v. Bellard*, 674 F.2d 330, 335 (5th Cir. 1982), *citing Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S. Ct. 2753, 2758, 61 L. Ed. 2d 521 (1979), and *Isbrandsten Co. v. Johnson*, 343 U.S. 779, 72 S. Ct. 1011, 1014, 96 L. Ed. 1294 (1952). Even where such an intention is explicit, "no statute is to be construed as altering the common law further than its words import." *United States v. Mead*, 426 F.2d 118, 123 (9th Cir. 1970).

The Eleventh Circuit has effectively held that the Packers and Stockyards Act mandates that compensated sureties not be treated as insurers and that they not have available to them defenses expressly set out in States' insurance codes, such as fraud in the inducement. No such change or abrogation in the common law is clearly and plainly expressed by the Packers and Stockyards Act, nor does the fair import of that statute's language require any such deviation from the common law. Accordingly, the Eleventh Circuit should be reversed.

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals ignores express and unambiguous provisions of Georgia's Insurance Code and regulations promulgated by the Georgia Insurance Commissioner, as well as substantial case and hornbook law, which support the petitioner's contention that it was engaged in the business of insurance and that the issues in this case must be resolved under Georgia's Insurance Code. Further, in applying surety law rather than insurance law, the Eleventh Circuit's decision bypasses the intent of Congress, expressed in the provisions of the McCarran-Ferguson Act, that the several States, rather than the federal government, should regulate the business of insurance within their borders. Finally, the Eleventh Circuit's decision refuses to acknowledge the distinction between compensated and uncompensated sureties recognized by this Court and the Seventh and Eighth Circuits. This Court should grant certiorari to reaffirm the right of the State of Georgia to regulate all aspects of the business of insurance within the state.

Respectfully submitted,

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APPENDIX

AMERICAN MANUFACTURING MUTUAL INSURANCE COMPANY,
Plaintiff-Counter-Claimant-Defendant-Appellee,

v.

TISON HOG MARKET, INC., Thomas T. Irvin, Commissioner of Agriculture for the State of Georgia as Trustee for any and all claimants under bonds issued for Thurstan D. Paulk, Jr. d.b.a. Paulk Livestock Co., and Coffee County Stockyard, Inc., Defendants-Appellants,

Gainesville Livestock Market Inc., Madison Hog Market, Inc., d.b.a. Townsend Livestock Market, et al., Defendants-Counter-Claimants-Appellants.

No. 98-8506.

United States Court of Appeals,
Eleventh Circuit.

Aug. 3, 1999.

Terry A. Dillard, Scott C. Crowley, Waycross, GA, for Gainesville Livestock, Amadison Livestock, Townsend, S. Carolina Farm, etc.

William E. Callaway, Jr., Claxton, GA, for Tison Hog.

John E. Hennelly, Robert S. Bomar, Deputy Atty. Gen., Isaac Byrd, Senior Asst. Atty. Gen., Atlanta, GA, for Irvin.

Jeffrey Y. Lewis, Swift, Currie, James R. McCain, Jr., Atlanta, GA, for American Mfg.

Appeals from the United States District Court for the Southern District of Georgia.

Before COX, Circuit Judge, FAY, Senior Circuit Judge, and NANGLE*, Senior District Judge.

COX, Circuit Judge:

Plaintiff American Manufacturing Mutual Insurance Company ("American") filed this action seeking a declaratory judgment that it was not liable to the defendant creditors on two surety bonds. The district court entered summary judgment in American's favor and the defendants appeal. For the reasons that follow, we vacate and remand.

I. Background

The Packers and Stockyards Act of 1921, 7 U.S.C. § 181 et seq., (the "PSA") and its implementing regulations require that every livestock dealer execute and maintain a reasonable bond to secure the performance of its obligations. *See* 7 U.S.C. § 204; 9 C.F.R. § 201.29. The PSA's bonding requirement was designed "to safeguard the farmers and ranchers who produce cattle against the losses they would suffer if they sold their livestock to insolvent or defaulting purchasers." *Travelers Indem. Co. v. Manley Cattle Co.*, 553 F.2d 943, 945 (5th Cir.1977) (citations omitted).

Two livestock dealers, Thurston Paulk, d/b/a Paulk Livestock Company ("Paulk Livestock"), and Coffee County Stockyard, Incorporated ("Coffee County Livestock"), applied to American to serve as a surety and

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* Honorable John F. Nangle, Senior U.S. District Judge for the Eastern District of Missouri, sitting by designation.

issue bonds for them to meet the PSA's requirements.[1] The applications for both bonds contained agreements to indemnify American for any losses that it might incur as a result of their issuance. The principal on the first bond was Thurston Paulk, d/b/a Paulk Livestock. The application was signed by Thurston Paulk in his role as the sole proprietor of Paulk Livestock. The indemnification agreement contained the purported signatures of Thurston Paulk, Betty Paulk, and a witness. The principal on the second bond was Coffee County Livestock. The application contained the signature of Thurston Paulk in his role as president of Coffee County Livestock. The indemnification agreement contained the purported signatures of Thurston Paulk, Betty Paulk, Ashley Paulk, and a witness. American relied upon the information contained in the forms and the alleged genuineness of the signatures in making the decision to issue the bonds.

After the bonds were issued, Paulk Livestock and Coffee County Livestock purchased numerous hogs from defendants Tison Hog Market, Inc.; Gainesville Livestock Market, Inc.; Madison Hog Market, Inc., d/b/a Townsend Livestock Market; South Carolina Farm Bureau Marketing Association; and Georgia Farm Bureau Marketing Association, Inc. When the defendant hog sellers did not

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[1] "A surety is a person who binds himself for the payment of a sum of money, or for the performance of something else, for another who is already bound for such payment or performance." 72 C.J.S. *Principal and Surety* § 3 (1987). The principal is the party who is bound for some payment or performance, and the obligee or creditor is the party who has a right to enforce payment or performance by the principal or surety. *See id.* at §§ 4-5.

receive payment for the hogs, they made claims against the surety bonds for the purchase money that they were due. Defendant Thomas T. Irvin, Commissioner of the Department of Agriculture for the State of Georgia, was the trustee for the bonds. In his role as trustee, he notified American of the claims being made on the bonds by the livestock sellers.

American conducted an investigation and learned that the bonds' indemnification agreements contained forged signatures. In particular, American discovered evidence suggesting that: (1) Ashley Paulk had not signed or authorized anyone to sign his name to the Coffee County Livestock bond indemnification agreement; and (2) Betty Paulk had not signed or authorized anyone to sign her name to either bond's indemnification agreement. American claimed that it would not have issued the bonds had it known that Betty and Ashley Paulk had not agreed to indemnify it, and it declared the bonds rescinded and returned all the premiums.

American then brought this action seeking a declaratory judgment relieving it from liability to the defendants on the ground that the bonds were void *ab initio* under Georgia insurance law due to the fraudulent and material misrepresentations of the bonds' principals. American argued that the principals had forged the signatures of Betty and Ashley Paulk on the indemnification agreements in order to induce it into issuing the bond. The defendants answered and counterclaimed seeking judgment for the amount due them on the bonds. They argued that Georgia insurance law did not apply to the surety contracts at issue in this case and that under both federal

and Georgia surety law, American was still liable on the bonds.

Cross motions for summary judgment were filed. The district court granted American's motion for summary judgment and denied those filed by the defendants. In its order, the court first held that the PSA did not preempt Georgia law. Then, applying Georgia insurance law, it concluded that the bonds were void *ab initio*. This appeal by the defendant livestock sellers and the Commissioner followed.

II. Standard of Review

We review a district court's entry of summary judgment *de novo*. *See Ross v. Clayton County, Ga.*, 173 F.3d 1305, 1307 (11th Cir.1999). Summary judgment is proper where there are no disputes of material fact and the movant is entitled to judgment as a matter of law. *Id.*

III. Discussion

The ultimate issue presented by this appeal is whether a surety in Georgia is liable on its bond to creditors when the principal fraudulently induces the surety to issue the bond. The defendants argue that American is still liable on the bonds under general surety law because fraud committed by a principal alone in inducing a surety to issue a surety bond does not release the surety from liability. They contend that the district court erroneously applied Georgia insurance law to determine American's liability when it should have applied either federal common law or Georgia surety law.

American responds that the district court correctly found no preemption and correctly applied Georgia insurance law.

Although the ultimate issue in this appeal is American's liability on the bonds, the key question that we must resolve first is what law applies to determine the liability. We begin our discussion, therefore, by examining whether the passage of the PSA has preempted state law regarding the liability of a surety on a bond obtained by a principal's fraud.

Pursuant to the Supremacy Clause of the United States Constitution, a federal statute may preempt state law in certain circumstances. *See* U.S. Const. art. VI, cl.2; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). There are three types of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption. *See Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1500 (11th Cir.1997), *cert. dismissed*, ___ U.S. ___, 118 S.Ct. 1793, 140 L.Ed.2d 933 (1998). We can dispense with the first two types of preemption readily. Express preemption occurs when Congress explicitly defines the extent to which federal law applies instead of state law. *Id.* There is no express preemption in this case because there is no language in the PSA that on its face preempts the application of state defenses.[2] Field

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[2] Section 228c provides that "No requirement of any State . . . with respect to the bonding of packers or prompt payment by packers for livestock purchases may be enforced upon any packer operating in compliance with the bonding provisions under section 204 of this title. . . . " 7 U.S.C. § 228c. It also provides, however, that "this section shall not preclude a

preemption occurs when Congress regulates a field so pervasively or passes a law that touches on a field implicating a dominant federal interest that an intent to preempt state law can be inferred. *See Teper v. Miller*, 82 F.3d 989, 993 (11th Cir.1996). There is no field preemption because there is no indication that Congress intended to exclusively regulate the entire livestock trading industry when passing the PSA.[3]

The final type of preemption is conflict preemption, and it requires some additional discussion. This type of preemption occurs either when "it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984) (citations omitted). In order to determine if there is conflict preemption, we must examine both the federal and state law that govern a surety's liability on a bond that has been obtained by fraud of a principal.

We turn first to the federal law that would apply to American's fraud defense. The PSA does not have any

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State from enforcing a requirement, with respect to payment for livestock purchased by a packer at a stockyard subject to this chapter, which is not in conflict with this chapter or regulations thereunder . . . " *Id.* As a result, on its face, this section only preempts certain types of inconsistent state laws.

[3] We note that there are some areas in the industry that Congress did not mean to regulate and where state law continues to apply. *See, e.g., Adams v. Greeson*, 300 F.2d 555 (10th Cir.1962); *Sig Ellingson & Co. v. De Vries*, 199 F.2d 677 (8th Cir.1952).

explicit provision dealing with fraud by a principal toward a surety, and there is no case law applying it to such a situation. We turn, therefore, to state common law and general principles of suretyship as a source for federal common law to fill the gap. *See Nachwalter v. Christie*, 805 F.2d 956, 959 (11th Cir.1986). We may only borrow from the common law of the states when it is consistent with the policies underlying the federal statute being applied. *Id.; see Textile Workers Union of America v. Lincoln Mills of Al.*, 353 U.S. 448, 456-57, 77 S.Ct. 912, 918, 1 L.Ed.2d 972 (1957).

It is well established under the common law of suretyship that "fraud or misrepresentation practiced by the principal alone on the surety, without any knowledge or participation on the part of the creditor or obligee, in inducing the surety to enter into the suretyship contract will not affect the liability of the surety." 72 C.J.S. *Principal and Surety* § 61 (1987); 74 Am.Jur.2d *Suretyship* § 133 (1974); *see also* Restatement (Third) of Suretyship and Guaranty § 12(2) (1996).[4] From a practical standpoint, this common law treatment of a principal's fraud is the only

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[4] As stated by the most recent Restatement of the Law:

> [i]f the secondary obligor's assent to the secondary obligation is induced by a fraudulent or material misrepresentation by either the principal obligor or a third person upon which the secondary obligor is justified in relying, the secondary obligation is voidable by the secondary obligor unless the obligee, in good faith and without reason to know of the misrepresentation, gives value or relies materially on the secondary obligation.

Restatement (Third) of Suretyship and Guaranty § 12(2) (1996).

one that makes sense. A creditor does business with a principal in reliance upon the existence of a bond. The bond provides security for the creditor because normally the creditor would have no way of knowing whether the principal is insolvent or otherwise an unreliable party with which to engage in business. *See* 72 C.J.S. *Principal and Surety* § 2 (1974) ("[u]nder a contract of suretyship the obligee or creditor is not under the necessity of seeing that the principal performs his conditions, since the surety must do so."). If the creditor's ability to recover on a bond was dependent on the accuracy of the principal's representations to the surety, then the value of the bond to the creditor would be greatly lessened because the creditor would have no way of knowing what representations were made in the procurement of the bond. More importantly for the case at bar, this common law approach is consistent with and furthers the purpose of the PSA. The common law enables a livestock seller to deal freely with livestock dealers knowing that the required bond will protect them in the event of a default even if the principal hid facts from the surety when obtaining the bond. We conclude, therefore, that federal law under the PSA would adopt the common law of suretyship regarding a surety's liability on a bond obtained by a principal's fraud.

We now turn our attention to state law. If the applicable law in Georgia is the same as the federal law and does not present an obstacle to the PSA's purposes, then there is no conflict preemption and we will apply the state law. The district court concluded that because American agreed to indemnify third parties in the event of certain contingencies, the bond was an "insurance contract" and

American was an insurer governed by Title 33 of the Georgia Code. *See* O.C.G.A. §§ 33-1-2(2) and (4).[5] Under the Georgia insurance code, fraudulent misrepresentations or material misrepresentations made in the procurement of an insurance contract prevent a recovery under the contract. *See* O.C.G.A. § 33-24-7. The district court applied § 33-24-7 and concluded that there was undisputed evidence of fraud that excused American from liability.

Instead of applying this insurance law, however, the district court should have applied Georgia surety law. The surety bonds in this case are surety contracts that are not governed exclusively by the insurance law of Georgia. Although the insurance code section does refer to a "surety" within the definition of a possible insurer, *see* O.C.G.A. § 33-1-2(4), the only type of insurance involving sureties addressed in Title 33 is surety insurance. The Code defines surety insurance as "insurance guaranteeing the performance of contracts other than insurance policies and guaranteeing and executing bonds, undertakings, and *contracts of suretyship*. . . . " O.C.G.A.

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[5] The insurance section of the Georgia Code defines an insurance contract as "a contract which is an integral part of a plan for distributing individual losses whereby one undertakes to indemnify another or to pay a specified amount or benefits upon determinable contingencies," *see* O.C.G.A. § 33-1-2(2), and an insurer as "any person engaged as indemnitor, surety, or contractor who issues insurance, annuity or endowment contracts, subscriber certificates, or other contracts of insurance. . . . " *See* O.C.G.A. § 33-1-2(4).

§ 33-7-7(2) (emphasis added).[6] Among other things, surety insurance is insurance that a surety will perform its obligations under a surety contract. This definition, by its clear terms, indicates that surety insurance is distinct and separate from surety contracts like those at issue in this case.[7]

The Georgia Code contains an entirely separate title that applies to suretyship contracts. *See* O.C.G.A. § 10-7-1 et seq. The chapter defines a contract of suretyship as one "whereby a person obligates himself to pay the debt of another in consideration of a benefit flowing to the surety . . . " O.C.G.A. § 10-7-1. This is the commonly understood definition of a surety relationship and describes the situation that we have in the case at bar. The Georgia Code does not contain a statement as to the effect of a principal's fraud on a surety's liability to the creditor. Georgia courts, however, have applied the common law

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[6] Surety insurance also includes:

> (1) Fidelity insurance, which is the insurance guaranteeing the fidelity of persons holding positions of public or private trust;
>
> . . .
>
> (3) Insurance indemnifying banks . . . against loss resulting from any cause of bills of exchange, notes, bonds, securities. . . .

O.C.G.A. § 33-7-7.

[7] We recognize that it may be that a surety is subject to some regulation and litigation in Georgia as an insurer. *See, e.g., Congress Re-Insurance Corp., Inc. v. Archer-Western Contr., Ltd.*, 226 Ga.App. 829, 487 S.E.2d 679 (1997) (surety subject to service of process under O.C.G.A. § 33-5-54). As discussed below, however, this fact has no bearing on the impact of substantive provisions of Georgia insurance law on surety contracts.

and held that a surety is still liable to a creditor even if the principal commits fraud so long as the creditor does not participate in the fraud. *See W.T. Rawleigh Co. v. Oliver*, 67 Ga.App. 748, 21 S.E.2d 490 (1942); *Broughton v. Jos. Lazarus Co.*, 13 Ga.App. 153, 78 S.E. 1024 (1913).

American contends that the Georgia legislature amended the insurance Code in 1961 and added section 33-24-7 (dealing with misrepresentations) with the intention of having it apply to all insurance contract applications, including applications for surety contracts. *See State Farm Mut. Auto. Ins. Co. v. Anderson*, 107 Ga.App. 348, 130 S.E.2d 144 (1963). As a result, American argues, the Georgia courts' decisions in *W.T. Rawleigh* and in *Broughton* are no longer good law. Although the legislature changed the law for all insurance contracts in 1961, there is no indication that section 33-24-7 was meant to change the common law rule relative to surety contracts. We note, for instance, that Title 10 and Title 33 both contain separate sections dealing with bad faith failure to pay. Although almost identical, the section in Title 33 applies to bad faith failure to pay on an insurance contract, while the one in Title 10 applies to bad faith failure to pay on a surety contract. Compare O.C.G.A. § 33-4-6 with O.C.G.A. § 10-7-30; *see McDevitt & Street Co. v. K-C Air Conditioning Service, Inc.*, 203 Ga.App. 640, 645-46, 418 S.E.2d 87 (1992); *Columbus Fire & Safety Equip. Co., Inc. v. American Druggist Ins. Co., Inc.*, 166 Ga.App. 509, 304 S.E.2d 471 (1983). The fact that separate sections exist suggests that the Georgia legislature meant for separate laws to apply to each type of contract. Furthermore, the Georgia legislature changed the common law treatment

of bad faith failure to pay when it included such a provision in the suretyship title of the Georgia Code. *See Travelers Indem. Co. v. Sasser & Co.*, 138 Ga.App. 361, 226 S.E.2d 121 (1976). The legislature's failure to enact a provision similar to section 33-24-7 in the suretyship title of the Code suggests that it did not mean to alter the common law of suretyship contracts regarding fraud by a principal.[8]

As the above analysis indicates, the federal law regarding fraud by a principal is the same as the Georgia law on the subject. Since there is no conflict and Georgia law does not frustrate the purposes of the PSA, we find no conflict preemption of Georgia surety law. Applying the common law to the case at bar, there is no evidence that the defendants participated in any fraud. The fraud was committed solely by the principals. Under these circumstances, American is not relieved of liability on the bonds. *See Broughton*, 13 Ga.App. at 153, 78 S.E. 1024. As a result, the district court's entry of summary judgment for American on the fraud defense was in error.

American's motion for summary judgment is also grounded upon several additional state law arguments as to why it is not liable on the bonds. The district court did not address these arguments because it disposed of the case on the fraud defense. We leave the questions of whether these defenses are preempted due to a conflict

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[8] American also argues that the Georgia surety code only applies to uncompensated sureties and that compensated sureties like that in the case at bar are governed by the insurance code. We find no merit to this contention.

with federal law and whether they have merit to the district court to decide on remand.

IV. Conclusion

For the foregoing reasons, the district court's judgment is vacated, and we remand this case for further proceedings consistent with this opinion.

VACATED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, Plaintiff, vs. THOMAS T. IRVIN, Commissioner of Agriculture for the State of Georgia as Trustee for Any and All Claimants under Bonds Issued for: THURSTON D. PAULK, JR., d/b/a PAULK LIVESTOCK and COFFEE COUNTY STOCKYARD, INC.; GAINESVILLE LIVESTOCK MARKET, INC.; TISON HOG MARKET, INC.; MADISON LIVESTOCK MARKET, INC. d/b/a TOWNSEND LIVESTOCK MARKET; SOUTH CAROLINA FARM BUREAU MARKETING ASSOCIATION; GEORGIA FARM BUREAU MARKETING ASSOCIATION, INC.; THE HEIRS-AT-LAW OF THURSTON D. PAULK, JR.; PAULK LIVESTOCK AND TRANSPORT, INC.; BETTY G. PAULK; JORDAN ASHLEY PAULK; COFFEE COUNTY STOCKYARD, INC., Defendants.	)	CIVIL ACTION NO. CV595-86

ORDER

(Filed Apr. 10, 97)

Currently before this Court are: the Motion for Summary Judgment filed by Plaintiff (Doc. 60); the Motion for Summary Judgment filed by Defendants Gainesville Livestock Market, Inc., Madison Livestock Market, Inc. d/b/a Townsend Livestock Market, Inc., South Carolina Farm Bureau Marketing Association, and Georgia Farm Bureau Marketing Association, Inc. (hereinafter "the Gainesville Defendants") (Doc. 50)[1]; the Motion for Summary Judgment filed by Defendant Tison Hog Market (Doc. 64); the Motion for Summary Judgment filed by Defendant Commissioner Thomas T. Irvin (Doc. 70); and the Motion for Summary Judgment filed by Defendant Jordan Ashley Paulk (Doc. 84). For the reasons stated below, this Court **GRANTS** the motions filed by Plaintiff and Defendant Jordan Ashley Paulk and **DENIES** the motions filed by the Gainesville Defendants, Defendant Tison Hog Market, and Defendant Commissioner Thomas T. Irvin.

BACKGROUND

Except where indicated, the following facts are not in dispute.

On January 27, 1993, Thurston Paulk d/b/a Paulk Livestock Company ("Paulk Livestock") applied with Plaintiff for a surety bond as required by the Packers and

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[1] This motion was summarily denied by this Court on March 31, 1997. For explanatory purposes, this Court denied the motion for the reasons stated in this order.

Stockyards Act, 7 U.S.C. § 181 *et seq.* ("PSA"). The application contained an indemnity agreement whereby the indemnitors agreed to indemnify Plaintiff for any losses which Plaintiff might incur as a result of issuing the bond. Appearing in the indemnity agreement were two signatures; one signature purported to be the signature of Thurston Paulk while the other purported to be the signature of his wife Betty Paulk. Glenda White signed the witness lines next to both signatures. Based on the information contained in the bond application, Plaintiff, on February 1, 1993, issued Bond No. 3SE779133-00 in the original principal amount of $80,000 ("Paulk Bond"). The amount of the Paulk Bond was increased to $85,000 on June 9, 1994, in a rider pursuant to a request from the United States Department of Agriculture ("U.S.D.A."). The Rider states that the Paulk Bond shall be subject to all its terms as modified by the Rider; on its face, the only textually apparent change is in the coverage amount.

On March 5, 1993, Coffee County Stockyard applied with Plaintiff for a PSA surety bond. The application contained an indemnity agreement whereby the indemnitors agreed to indemnify Plaintiff for any losses which Plaintiff might incur as a result of issuing the bond. Appearing in the indemnity agreement were three signatures; one signature purported to be the signature of Thurston Paulk while the other two purported to be the signature of Betty Paulk and the signature of Ashley Paulk. Glenda White signed the witness lines next to all three signatures. Based on the information contained in the bond application, Plaintiff, on March 10, 1993, issued Bond No. 3SE77914-00 in the original principal amount of $75,000 ("Coffee County Bond"); the Coffee County Bond

was later changed to Bond No. 3SE779121-00. The amount of the Coffee County Bond was increased to $80,000 on June 9, 1994, in a rider pursuant to a request from the U.S.D.A. The Rider states that the Paulk Bond shall be subject to all its terms as modified by the Rider; on its face, the only textually apparent change is in the coverage amount.

On July 6, 1994, a General Agreement of Indemnity was executed bearing the purported signatures of Thurston Paulk and Betty Paulk. Both Mr. and Mrs. Paulk's signatures were accompanied by the witness signatures of Glenda White. The General Agreement of Indemnity stated that the indemnitors agreed to indemnify and hold Plaintiff harmless from every claim, demand, liability, cost, charge, suit, judgment and expense which Plaintiff had to pay or incur in consequence of having executed the Paulk Bond and/or the Coffee County Bond.

On December 5, 1994, the U.S.D.A. issued an administrative order suspending the registrations of the Paulk Livestock Company and Coffee County Stockyard, Inc., until each company could demonstrate that its assets exceeded its liabilities. The order also directed the businesses to no longer: engage in business while insolvent; issue checks without sufficient funds backing them; fail to pay full purchase price of livestock; misrepresent to purchasers of livestock the actual purchase weight of livestock. As a result of previous violations, the U.S.D.A. assessed a $50,000 civil penalty jointly and severally against Coffee County Stockyard and Thurston Paulk and a $15,000 civil penalty jointly and severally against

Thurston Paulk and another individual not involved in the instant case.

Plaintiff was neither a party to the U.S.D.A. Order nor timely notified of those proceedings. Furthermore, Plaintiff was never notified of the insolvency of Paulk Livestock or Coffee County Stockyards. Plaintiff claims that, had it received notice of the investigation by the U.S.D.A. or notice of the U.S.D.A. order, it would have terminated the Bonds effective January 4, 1995. (September 4, 1996, Affid. of Robert L. Love, ¶ 16.)

Defendant Madison Livestock Market, Inc. d/b/a Townsend Livestock Market made a claim against the Paulk Bond in the amount of $27,907.99 for hog sales which occurred on November 7 and 14, 1994. Defendant South Carolina Farm Bureau Marketing Association made a claim against the Paulk Bond in the amount of $62,352.27 for hog sales which occurred on October 18 and November 15 and 16, 1994. Defendant Tison Hog Market, Inc., made separate claims against both the Paulk Bond and the Coffee County Bond in the amount of $54,869.91 for hog sales which occurred on November 1, 3, 8, and 10, 1994. Defendant Gainesville Livestock Market, Inc., made a claim against the Coffee County Bond in the amount of $16,895.20 for hog sales which occurred on January 20, 1995. Defendant Georgia Farm Bureau Marketing Association, Inc., made a claim in the amount of $11,345.96 against the Coffee County Bond for hog sales which occurred on January 11, 1995.

On July 19, 1995, Ashley Paulk testified by affidavit that he did not sign, authorize, approve or ratify the signing of his name to the application for the Coffee

County Bond. (July 19, 1995, Affid. of Jordan Ashley Paulk, ¶¶ 6-7.) On July 25, 1995, Glenda White Lang (formerly Glenda White) testified by affidavit that, although she had signed her name as a witness to the application for the Coffee County Bond, she did not actually see either Ashley Paulk or Betty Paulk sign their names on the application. (July 25, 1995, Affid. of Glenda White Lang, ¶ 4.) She also never actually saw Betty Paulk sign her name on either application for the Paulk Bond or the General Indemnity Agreement. (*Id.* ¶¶ 5-6.) Ms. Lang testified that she signed the witness lines on all three documents simply because her employer, Thurston Paulk, told her to do so. (*Id.* ¶¶ 4-6.) On July 28, 1995, Plaintiff declared the Coffee County Bond rescinded and returned all premiums paid under the Bond to the Defendant Coffee County Stockyard.

On June 12, 1996, Betty Paulk testified by affidavit that she never signed, authorized, approved or ratified the signing of her name on the application for the Paulk Bond, the application for the Coffee County Bond, or the General Indemnity Agreement. (June 12, 1996, Affid. of Betty Gibbs Paulk, ¶¶ 4, 6, 8.) Three days later, Plaintiff declared the Paulk Bond rescinded and returned all premiums paid under the Bond to Defendant Paulk Livestock Company.

Plaintiff claims that, under applicable underwriting guidelines, it never would have issued either the Paulk Bond or the Coffee County Bond had it known that neither Ashley Paulk or Betty Paulk had agreed to indemnify Plaintiff in the event of a loss. (Love Affid., ¶ 12.)

On August 30, 1995, Plaintiff filed its Complaint in the above-referenced action seeking declaratory judgment against Defendants pursuant to 28 U.S.C. § 2201. Through this action, Plaintiff seeks a decree from this Court that the Paulk and Coffee County Bonds are void *ab initio*. Alternatively, Plaintiff seeks indemnification from Defendants Jordan Ashley Paulk and Betty Paulk pursuant to the terms of the various indemnification clauses. On July 14, 1995, Defendant Tison Hog Market filed suit against Plaintiff, seeking payment of its $54,869.91 in claims made under both bonds. The action, originally filed in the Superior Court of Tatnall County, Georgia, was removed by American Manufacturers to the Southern District of Georgia, Statesboro Division, CV695-154. Then-Chief Judge B. Avant Edenfield granted the parties' Joint Motion to Transfer and Consolidate Cases on September 8, 1995, and on September 20, 1995, CV695-154 was given a Waycross Division civil action designation (CV595-88), consolidated with the above-referenced case, and assigned to the undersigned Judge for plenary disposition.

On September 27, Defendant Tison Hog Market answered the Complaint in the above-referenced case and filed a Crossclaim against Defendants Thurston D. Paulk, Jr., Paulk Livestock, Jordan Ashley Paulk, and Coffee County Stockyard. On October 23, the Gainesville Defendants answered the Complaint and filed a Counterclaim against Plaintiff. On October 27, Defendant Jordan Ashley Paulk answered the Complaint and filed a Counterclaim against Plaintiff.

This Court closed this case for statistical purposes on January 4, 1996, due to Defendant Thurston Paulk having

filed for Chapter 11 bankruptcy protection. On May 17, this Court lifted the stay, reopened the case, and directed the Clerk of Court to issue a new scheduling notice. From August 16 through September 26, the parties filed their summary judgment motions referenced in the introductory section of this Order. This Court now considers the motions.

ANALYSIS

I. *When summary judgment is appropriate.*

The "purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmovant to establish, by going beyond the pleadings, that there is a genuine issue as to facts material to the nonmovant's case. *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1583 n.16 (11th Cir. 1991). A dispute of material fact "is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving

party, [then] there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587.

In assessing whether the movant is entitled to summary judgment in its favor, the district court must review the evidence and reasonable factual inferences arising from it in the light most favorable to the nonmoving party. *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 (11th Cir. 1992). This Court must avoid weighing conflicting evidence during this endeavor. *Anderson*, 477 U.S. at 255. Where a reasonable fact finder may "draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment." *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir. 1989) (citation omitted). However, if the evidence is merely colorable or not significantly probative, summary judgment may be granted. *Id.*

II. *Plaintiff is entitled to summary judgment.*

A. The PSA does not preempt Georgia surety law.

Having read the summary judgment motions filed in this case, it quickly became evident to the Court that the main question presented is: Does the PSA preempt state law thereby depriving Plaintiff of its defenses created through the Georgia law on sureties? After extensive research, this Court concludes that the PSA exists in concert with state surety law and, therefore, the defenses found within state law are available to sureties such as Plaintiff.

Any state law that conflicts with federal law is preempted by the federal law and is without effect under the

Supremacy Clause of the United States Constitution, Art. 6, cl. 2. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citing *McCulloch v. Maryland*, 17 U.S. 316, 427 (1819)). State laws established under the historic police powers of the states, however, are not superseded by federal law unless preemption is the "clear and manifest" purpose of Congress. *Id.* (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Furthermore, as Justice Stevens observed, "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state law causes of action." *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240, 2250 (1996). Accordingly, the " 'purpose of Congress is the ultimate touchstone' " of any preemption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

Congressional intent to preempt state law may be revealed in several ways: (1) *express preemption*, in which Congress explicitly defines the extent to which its enactments preempt state law; (2) *field preemption*, in which state law is preempted because Congress has regulated a field so pervasively, or federal law touches on a field implicating such a dominant federal interest that an intent for federal law to occupy the field exclusively may be inferred; and (3) *conflict preemption*, in which state law is preempted by implication because state and federal law actually conflict so that it is impossible to comply with both or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996) (citations omitted).

The statute in question states:

> On and after July 12, 1943, the Secretary [of Agriculture] may require reasonable bonds from every market agency (as defined in this subchapter), every packer (as defined in subchapter II of this chapter) in connection with its livestock purchasing operations (except that those packers whose average annual purchases do not exceed $500,000 will be exempt from the provisions of this paragraph), and every other person operating as a dealer (as defined in this subchapter), under such rules and regulations as he may prescribe, to secure the performance of their obligations, and whenever, after due notice and hearing, the Secretary finds any registrant is insolvent or has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction. If the Secretary finds any packer is insolvent, he may after notice and hearing issue an order under the provisions of section 193 of this title requiring such packer to cease and desist from purchasing livestock while insolvent, or while insolvent from purchasing livestock except under such conditions as the Secretary may prescribe to effectuate the purposes of this chapter.

7 U.S.C. § 204. While this statute certainly imposes considerable regulations upon livestock dealers throughout the several states, this Court finds that it does not preempt the state law defenses asserted by Plaintiff.

1. *No express preemption.*

While the language of § 204 does not include any express preemption, another section of the PSA does include a preemption clause applicable to § 204:

> No requirement of any State or territory of the United States, or any subdivision thereof, or the District of Columbia, with respect to bonding of packers or prompt payment by packers for livestock purchases may be enforced upon any packer operating in compliance with the bonding provisions under section 204 of this title, and prompt payment provisions of section 228b of this title, respectively: *Provided*, That this section shall not preclude a State from enforcing a requirement, with respect to payment for livestock purchased by a packer at a stockyard subject to this chapter, which is not in conflict with this chapter or regulations thereunder: *Provided further*, That this section shall not preclude a State from enforcing State law or regulations with respect to any packer not subject to this chapter or section 204 of this title.

7 U.S.C. § 228c.

"By including an express preemption clause in the [PSA], Congress had demonstrated its intent that the Act preempt at least some state law. Therefore, the issue in this case is not whether Congress intended for the [PSA] to have any preemptive effect, but the intended scope of preemption – the extent to which the [PSA] preempts state law." *Lewis v. Brunswick Corp.*, ___ F.3d ___, No. 96-8130, slip op. at 1133 (11th Cir. Mar. 21, 1997). In analyzing the scope of this preemption clause, this Court

must apply a presumption in favor of a narrow interpretation of the clause. *Medtronic*, 116 S.Ct. at 2250.

Construing this preemption clause narrowly, this Court is simply unable to find any express preemption of the sort desired by Defendants. While the clause disallows conflicting state bonding requirements, it does nothing to the collateral issues of state contract law. Looking at the four corners of the preemption clause, this Court will not expansively read into it the understanding that state laws pertaining to the procedural validity of sureties are preempted by the PSA. As the preemption clause does not expressly so provide, there cannot be said to be any express preemption of the Georgia law on sureties. The preemption clause pertains only to direct bonding requirements and implicates nothing as to the state law governing the legal sufficiency of the bond application process. *See* S. REP. NO. 94-932, § 9 (1976); H.R. CONF. REP. No. 94-1391, Am. 54 (1976). Consequently, this Court determines that Congress has not expressly preempted state surety laws insofar as the PSA is concerned.

2. *No field preemption.*

It would be a logical presumption to state that if Congress intended to preempt a certain segment of state law and if Congress saw fit to include a preemption clause in a given statute then the scope of preemption should be strictly limited to the scope described in the preemption clause and anything falling without that scope, *ergo*, would not be preempted and no inferences of preemption could be drawn. Indeed, the *Cipollone* Court indicated that just such an approach was appropriate. 505

U.S. at 517. Three years later, however, the Supreme Court concluded that the preemption question was just not that easy to answer: "The fact that an express definition of the pre-emptive reach of a statute 'implies' – *i.e.*, supports a reasonable inference – that Congress did not intend to pre-empt any other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption." *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483, 1488 (1995).

Falling within the scope of implied preemption is the doctrine of field preemption. "If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Field preemption may be found only when the federal legislation regulates conduct in a field over which Congress intended the Government to have *exclusive* control. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230. A court may infer this intent either when the federal regulatory scheme is so pervasive that no room is left for states to supplement it or when the federal interest in an area is so great that it necessarily precludes state regulation of the same subject. *English*, 496 U.S. at 79; *Rice*, 331 U.S. at 230. When the question of preemption involves areas of law customarily occupied by the states (such as is the case here), congressional intent to supersede state laws must be "clear and manifest." *Rice*, 331 U.S. at 230.

No party has made any significant attempt to argue that the PSA preempts the entire field of livestock trading. This Court finds that there is no clear and manifest showing to indicate that Congress intended to occupy the field of livestock trading so extensively as to eradicate the

historic system of state contract inherently necessary to the governance of that industry. The current state of preemption jurisprudence suggests that any such argument would be futile. *See Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190 (1983) (finding that, even where federal government *did* occupy the entire field of nuclear safety, states retained traditional control over economic aspects of public utilities, including the power to prohibit nuclear plant construction for economic reasons); *see also Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613-14 (1991) (ruling that field preemption could not be found where federal statute contemplates the states' regulatory involvement and leaves substantial portions of the field vacant). This Court concludes that there has been no field preemption of state laws by the PSA.

3. *No conflict preemption.*

The greatest efforts within Defendants' preemption arguments have been focused upon the notion of conflict preemption. "If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 464 U.S. at 248 (citations omitted). The purposes and objectives of Congress must be found in the Act and then examined to determine whether Congress acted in such a manner that a finding of preemption is mandated. *Hines v. Davidowitz*, 312 U.S. 52, 68-69 (1941).

In analyzing whether state law conflicts with federal legislation, the Supreme Court noted:

> Ordinarily, the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply pre-emption of state remedies. The Court has observed: "Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. . . . Instead, we must look for special features warranting preemption."

English, 496 U.S. at 87 (quoting *Hillsborough County, Florida vs. Automated Med. Lab., Inc.*, 471 U.S. 707, 719 (1985)). When the matters allegedly preempted are historically areas of local concern, one is hard-pressed to find the "special features" necessary to find preemption in the absence of clear congressional intent to that effect. *See Hillsborough County*, 471 U.S. at 719.

This Court has engaged in extensive research, after presupposing that there would be plenty of case law on point, and has found only one case which squarely addresses the preemption issue in this case: *Williams Cattle Co., Inc. v. Gus Juengling & Son, Inc.*, 611 N.E.2d 407 (Ohio Ct. App. 1992).

In *Williams*, a livestock seller sued a livestock buyer and its surety on a PSA bond after the buyer failed to pay for livestock. *Id.* at 410. The surety denied coverage, claiming that, under the surety law of Ohio, it had no liability due to certain acts on the part of the principal which increased the surety's risks under the bond. *Id.* at 408. The buyer sued the seller and the surety pursuant to

the PSA. *Id.* The trial court ruled that the PSA preempted the state surety law defenses asserted by the surety and granted the buyer's motion for summary judgment. *Id.* The surety appealed to the Ohio Court of Appeals, which reversed the trial court's decision. *Id.* at 409.

In reversing the trial court, the *Williams* court found that, under the doctrine of conflict preemption, the PSA did not preempt Ohio surety law. *Id.* at 410. After reviewing the line of Supreme Court cases on the doctrine, the *Williams* court simply concluded: "The Act, fairly interpreted, is not in actual conflict with the state law. Ohio's law on discharge of sureties is not, under the facts of the case on review, an obstacle to the accomplishment of the full purposes of Congress." *Id.* In making this determination, the court determined that Congress had acted in a constrained fashion and the purposes of the PSA were limited so as to not conflict with the supplemental law of the states. *Id.* at 410-11.

Cases dealing with other aspects of state law and the PSA have also found that the PSA does not preempt state law. *See Mahon v. Stowers*, 416 U.S. 100, 111 (1974) (finding that, despite policy indications to the contrary, the PSA does not preempt state laws on the priority of creditors); *Adams v. Greeson*, 300 F.3d 555, 557-58 (10th Cir. 1962) (finding that state law on commercial paper not preempted by PSA); *Fillippo v. S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1008, 1013 (E.D. Pa. 1978) (holding that the PSA does not preempt state law debt actions by livestock sellers); *In re Frosty Morn Meats*, 7 B.R. 988, 999 (M.D. Tenn. 1980) (finding that the PSA "was not intended to supersede or disturb state law respecting valid chattel mortgages on livestock delivered at public stockyards").

This Court, having reviewed the above-referenced decisions, and having observed that there is no policy statement in the PSA which would give rise to a presumption of conflict preemption, concludes that the Georgia law on surety does not conflict with the purposes of Congress and, therefore, Congress has not, through the PSA, preempted the expanse of contract laws historically left to the several states. Because this Court has found that the state law defenses asserted by Plaintiff have not been preempted, it now turns to the question of whether the state laws relieve Plaintiff of liability under the subject bonds.

B. *The Paulk and Coffee County Bonds are void under Georgia law.*

Because Plaintiff ostensibly agreed to indemnify third parties in the event of certain contingencies, the Paulk and Coffee County Bonds qualify as insurance contracts and Plaintiff qualifies as an insurer within Title 33 of the Georgia Code. *See* O.C.G.A. §§ 33-1-2(2) and (4). Plaintiff has properly invoked the protections available to insurers through O.C.G.A. §§ 33-24-7 which provides:

> (a) All statements and descriptions in any application for an insurance policy or annuity contract or in negotiations for such, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties.
>
> (b) Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:

> (1) Fraudulent;
>
> (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
>
> (3) The insurer in good faith would either not have issued the policy or contract or would not have issued a policy or contract in as large an amount or at the premium rate as applied for or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been known to the insurer as required either by the application for the policy or contract or otherwise.

Although Plaintiff need only prove one of the three factors listed under O.C.G.A. § 33-24-7(b), it has proven that, in fact, all of the factors would excuse its liability under the Paulk and Coffee County Bonds.

There has been presented to the Court no material controversy regarding whether the purported signatures of Ashley Paulk and Betty Paulk on the bond applications and General Indemnity Agreement were authentic. Both Ashley Paulk and Betty Paulk have testified that they never signed the documents and, Glenda White Lang, the alleged witness to those signatures, testified that she never saw either Ashley Paulk or Betty Paulk sign the bond applications or General Indemnity Agreement. While Defendants have tried to sway this Court that the fact that the signatures were made in different ink is sufficient to warrant submission to a jury, this Court disagrees. The only "evidence" presented by Defendants in an attempt to show that the signatures were authentic

amounts to nothing more than a "scintilla" (or a suggestion of an inference of a remote possibility) which, as it is well settled, will not circumvent the granting of summary judgment. *Walker v. Darby*, 911 F.3d 1573, 1577 (11th Cir. 1990).

As Ms. White has testified that Thurston Paulk essentially commanded her to "witness" the bogus signatures, this Court can do little else other than to impute scienter to Thurston Paulk which equates to a finding of a fraudulent statement on the bond applications and General Indemnity Agreement. *See Jessup v. Franklin Life Ins. Co.*, 117 Ga. App. 389 (1968) (observing that applicant is charged with knowledge of the contents of an application signed by him). A false statement regarding the authenticity of a signature on a contract amounts to a "misrepresentation of a material existing fact . . . and a fraudulent thing in law which would avoid the contract." *W.T. Rawleigh Co. v. Kelly*, 78 Ga. App. 10, 13 (1948); *see also Glass v. Stewart Title Guar. Co.*, 181 Ga. App. 804, 805 (1987) (commenting that it is well established in Georgia law that a forged document constitutes a nullity). Therefore, this finding of fraud renders the subject bonds void *ab initio*. *Metropolitan Life Ins. Co. v. Shaw*, 30 Ga. App. 97 (1923); *see also Wooten v. Life Ins. Co.*, 90 Ga. App. 665 (1956).

The bonds are also voidable under O.C.G.A. §§ 33-24-7(b) (2) and (3) because Plaintiff has shown that the misrepresentstaion was material to the hazards assumed by Plaintiff and it would not have issued the bonds had it known that Ashley Paulk and Betty Paulk had not endorsed the applications or General Indemnity Agreement. Where the undisputed evidence shows that

the insurer would not have issued the policy had it known of the actual circumstances, "the evidence demands a finding that misrepresentations . . . were material to the acceptance of the risk." *Smith v. Integon Life Ins. Corp.* 195 Ga. App. 481, 482 (1990). In this case, the uncontradicted evidence demonstrates that, "[u]nder applicable underwriting guidelines, American Manufacturers would not have issued either the Paulk Bond or the Coffee County Stockyard Bond had it known that neither Betty Paulk nor Ashley Paulk agreed to indemnify American Manufacturers, in other words, that neither had signed nor authorized their signatures on the Paulk Application and the Coffee County Application." (Love Affid., ¶ 12.) This evidence shows that the insurer, Plaintiff, and the insurance community, generally, consider the requirement of surplus indemnitors as material to the determination regarding issuance of bonds. "Because the evidence demands a finding that misrepresentations were made on the application of insurance which were material as a matter of law, recovery under the policy is precluded." *Smith*, 195 Ga. App. at 482; *see also Miller v. Nationwide Ins. Co.*, 202 Ga. App. 737, 738 (1992).

For similar reasons, summary judgment is warranted under O.C.G.A. § 33-24-7(b) (3). "[T]he uncontradicted affidavit of the insurer that it would not have issued the policy in question had it known the truth [behind the statements on the application] precludes any genuine issue of fact with respect to whether the insurer in good faith would have issued the policy." *Graphic Arts Mut. Ins. Co. v. Pritchett*, 220 Ga. App. 430, 432-33 (1996). In cases such as this where there has been a material misrepresentation and were the only evidence before the Court is that

the insurer would not have issued the policy but for the misrepresentation, the statutory defense eviscerates any claim for indemnity made under the bond. *Id.* Under this subsection, Plaintiff need not show that Thurston Paulk acted in bad faith or with any fraudulent intent; Plaintiff need only show that a representation contained on the application was false and that the misrepresentation was material to the level of risk assumed by it. *Haugseth v. Cotton States Mut. Ins. Co.*, 192 Ga. App. 853, 854 (1989). In this case, the uncontradicted evidence before this Court shows that neither Betty Paulk or Ashley Paulk agreed to be indemnitors under the Paulk and Coffee County Bonds. The uncontradicted evidence also shows that Plaintiff would not have issued the bonds had it known that they had not agreed to be indemintors; furthermore, the nature of the risk assumed by Plaintiff was increased due to there being, in fact, only one indemnitor: Thurston Paulk. Therefore, summary judgment is warranted under O.C.G.A. § 33-24-7(b) (3). *Davis v. John Hancock Mut. Life Ins.*, 202 Ga. App. 3, 5 (1991).

For the reasons stated above, and because, upon discovery of the misrepresentations, Plaintiff acted promptly to declare the subject bonds rescinded and returned all premiums paid thereunder, this Court finds no reason not to grant Plaintiff's Motion for Summary Judgment. *See Haugseth*, 192 Ga. App. at 854-55.

III. *Conclusion.*

This Court, having concluded that Plaintiff's Motion for Summary Judgment should be granted, therefore **DECLARES** that Plaintiff is not liable to any party under

the bonds discussed within this Order. Furthermore, because the uncontradicted evidence shows that Defendant Jordan Ashley Paulk did not sign or authorize the signing of his name to any indemnity agreement, his Motion for Summary Judgment must also be granted and he and Betty Paulk are **DISMISSED** as Defendants to this case. The remaining motions for summary judgment are, consequently, denied.

As this order completely disposes of the issues contained in the sister case, *Tison Hog Market, Inc. v. American Manufacturers Mutual Insurance Company*, (CV595-88), the Clerk of Court is **DIRECTED** to file a certified copy of this Order into the case file of CV595-88 and to **CLOSE** that case.

Meanwhile, in the world of CV595-86, there appear to remain some crossclaims among the Defendants. Within the next fifteen days, any Defendant wishing to pursue any previously filed crossclaim will file a brief addressing the nature of the claim and addressing whether this Court retains any jurisdiction over that claim now that the issue of the PSA Bonds has been disposed of. If this Court does not hear from the crossclaiming Defendants within that time period, this Court will assume that they no longer wish to pursue their claims in this venue and the crossclaims will be dismissed without prejudice.

SO ORDERED, this 9th day of April, 1997.

/s/ William T. Moore, Jr.
WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA